

1 UNITED STATES COURT OF APPEALS

2
3 FOR THE SECOND CIRCUIT

4
5 August Term 2004

6
7
8 (Argued: July 15, 2005 Decided: November 8, 2005)

9
10 Docket No. 04-5563-cv

11
12 - - - - -x

13
14 24/7 RECORDS, INC.,

15
16 Plaintiff-Appellant,

17
18 - v.-

19
20 SONY MUSIC ENTERTAINMENT, INC. and
21 SHERIDAN SQUARE ENTERTAINMENT, LLC,
22 doing business as Artemis Records,

23
24 Defendants-Appellees.

25
26
27 - - - - -x

28
29 Before: JACOBS and B.D. PARKER, Circuit Judges,
30 and GLEESON, District Judge.*

31
32 Appeal from a judgment of the United States District
33 Court for the Southern District of New York (Cedarbaum, J.),
34 dismissing, on summary judgment, claims for breach of
35 contract, tortious interference with contract, and unfair
36 competition.

* The Honorable John Gleeson of the United States District Court for the Eastern District of New York, sitting by designation.

1 Affirmed in part, reversed in part.
2

3 ROBERT W. CINQUE, Cinque &
4 Cinque, P.C., New York, NY
5 (JAMES P. CINQUE, on the brief),
6 for Appellants._____

7
8 GREGORY A. CLARICK, Manatt,
9 Phelps & Phillips, LLP (STEVEN
10 M. HAYES, on the brief), for
11 Appellees.
12
13

14 DENNIS JACOBS, Circuit Judge:

15 This dispute arises out of a record distribution
16 agreement (the "Agreement") between producer 24/7 Records,
17 Inc. ("24/7") and distributor Sheridan Square Entertainment,
18 LLC d/b/a Artemis Records ("Artemis"). The dispute was
19 sparked by 24/7's production of a cover version of "The
20 Ketchup Song (Heh Hah)."

21 24/7 alleges that Artemis breached its obligation to
22 distribute the Ketchup Song, wrongfully terminated the
23 Agreement, and (among other things) made overcharges and
24 underpayments. 24/7 further alleges that Sony Music
25 Entertainment, Inc. ("Sony"), whose affiliate distributed
26 the original Ketchup Song, pressured Artemis to cancel
27 distribution of the song and to terminate the Agreement, and
28 thereby tortiously interfered with the Agreement and

1 violated New York's unfair competition laws (Artemis and
2 Sony are referenced collectively as "Appellees").

3 24/7 appeals from a judgment entered on September 20,
4 2004 by the United States District Court for the Southern
5 District of New York (Cedarbaum, J.), dismissing the
6 complaint on Appellees' motion for summary judgment. We
7 affirm in part, and reverse in part.

8 9 **BACKGROUND**

10 24/7, an independent Florida-based record label,
11 entered into a distribution agreement with Artemis, making
12 Artemis the "sole and exclusive" distributor of all 24/7
13 recordings released in the United States for an initial term
14 of three years. The Agreement contemplated that RED
15 Distribution, Inc. ("RED"), a Sony subsidiary, would perform
16 certain distribution tasks on Artemis's behalf. As of
17 November 2002, there were eleven 24/7 records in
18 distribution (with other recordings in preparation),
19 including the Ketchup Song.

20 Earlier in 2002, a group called "Las Ketchup" recorded
21 "The Ketchup Song (Heh Hah)." That recording was
22 distributed by a Sony affiliate, Columbia Records. The

1 Ketchup Song became a success overseas, and soon after, 24/7
2 recorded a cover performed by a group called "The Hines
3 Girls." Distribution of 24/7's Ketchup Song began at the
4 latest on November 5, 2002, with a CD jacket featuring a
5 ketchup bottle with a label arguably suggestive of the Heinz
6 ketchup label.

7 Shortly after 24/7's Ketchup Song was released, Artemis
8 halted distribution, claiming (in a November 7, 2002 letter
9 from Artemis's Executive Vice President of Business and
10 Legal Affairs Adrian White to 24/7's CEO Lou Pace) that
11 continued distribution of the song "might infringe rights
12 owned by the distributor" of the Las Ketchup version, and
13 might trigger a trademark dispute with H. J. Heinz Co. 24/7
14 alleges that those reasons were pretextual; that the true
15 reason Artemis pulled the plug on the Ketchup Song was
16 corporate pressure by Sony, which wanted no competition for
17 the original Las Ketchup recording; and that Artemis pulled
18 the plug on the entire distribution agreement for the same
19 reason, a move that allegedly led to 24/7's demise. Artemis
20 claims that the Agreement was never terminated.

21 The complaint in this action alleges that Artemis
22 breached the Agreement by: [i] failing to fulfill its

1 contractual obligation to distribute 24/7's Ketchup Song
2 single (the "Ketchup Song claim"); [ii] wrongfully
3 terminating the Agreement (the "termination claim"); and
4 [iii] among other things, failing to pay 24/7 royalties and
5 wrongfully charging or overcharging 24/7 (the "miscellaneous
6 claims").¹ The complaint also alleges that Sony pressured
7 Artemis to cancel the distribution of the Ketchup Song
8 single and to terminate the Agreement, thereby tortiously
9 interfering with the Agreement and violating New York's
10 unfair competition laws. Artemis and Sony moved for summary
11 judgment, arguing principally that [i] cancellation of the
12 distribution of the Ketchup Song was justified by concerns
13 over potential copyright and trademark liability; [ii] that
14 Sony did not induce Artemis into cancelling distribution of
15 the Ketchup Song; and that [iii] Artemis never terminated
16 the Agreement. The district court granted Appellees' motion
17 for summary judgment, and dismissed the complaint.

18 **DISCUSSION**

19

20

¹ While we refer to the allegations concerning the Ketchup Song, the termination of the Agreement, and the miscellaneous breaches of the Agreement as "claims," we note that 24/7's complaint specified these individual breaches as part of a single omnibus breach-of-contract claim.

1 We review the district court's grant of summary
2 judgment de novo, reviewing the evidence in the light most
3 favorable to 24/7. See Anthony v. City of New York, 339
4 F.3d 129, 134 (2d Cir. 2003). Summary judgment is proper if
5 "there is no genuine issue as to any material fact" and
6 Appellees are "entitled to a judgment as a matter of law."
7 Fed. R. Civ. P. 56(c).

8
9 **I. Breach of Contract**

10
11
12 a. The Ketchup Song

13 24/7 claims that Artemis breached the Agreement by
14 failing to distribute 24/7's Ketchup Song. The district
15 court held that, regardless of Artemis's actual motivations
16 for halting distribution, 24/7 failed to obtain a copyright
17 license from Sony for use of the song;² that a copyright
18 license was a condition on distribution by Artemis; and that
19 24/7 therefore cannot assert that Artemis breached any
20 obligation to distribute that work. We agree.

21 The Agreement is governed by New York law, under which,

² While it is not clear from the record who owned the Ketchup Song copyright, it is undisputed that a Sony affiliate, Sony/ATV Publishing LLC, published the song, and Sony/ATV is the sole entity claimed by either party as having authority to grant or deny a license.

24/7 must prove the following to make out a claim for breach of the Agreement: [i] the existence of a contract; [ii] the adequate performance of the contract by 24/7; [iii] the breach of the contract by Artemis; and [iv] damages. Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co., 375 F.3d 168, 177 (2d Cir. 2004). 24/7 cannot establish that its own performance was adequate. See Merritt Hill Vineyards, Inc. v. Windy Heights Vineyard, Inc., 61 N.Y.2d 106, 113 (1984) ("[A] contracting party's failure to fulfill a condition excuses performance by the other party whose performance is so conditioned.").

Section 4.01 of the Agreement states:

[24/7] solely shall be responsible for, and shall pay all costs in connection with, each of the following:

* * *

(b) The securing, in writing, of all necessary licenses, consents and permissions required for the distribution of Records hereunder, including, without limitation, from recording artists, producers, other performers, music publishers, unions and guilds, and other Persons rendering services or granting rights in connection with the Recordings and the Records.

(emphasis added). In section 10.01, 24/7 "represent[s] and warrant[s]" that it either has,

1 or prior to release hereunder shall have, and
2 shall at all times thereafter continue to have in
3 effect a valid and enforceable grant of rights or
4 license . . . with respect to each Recording, each
5 musical composition and all other copyrightable
6 materials embodied in or on the Records
7 (including, without limitation, mechanical
8 licenses for all musical compositions and licenses
9 for so-called "samples").

10
11 (emphasis added). This representation required 24/7 to
12 obtain a license for use of the Ketchup Song, which 24/7
13 failed to do, before Artemis became obligated to distribute
14 that record.

15 In order to comply with the Artemis contract and to
16 avoid copyright infringement for the Ketchup Song cover,
17 24/7 was required to obtain either a negotiated license
18 (which Sony was free to grant or deny) or a compulsory
19 license, which would allow 24/7 to cover the Ketchup Song
20 without Sony's consent so long as it notified Sony of its
21 intent to do so and complied with such statutory
22 requirements as the payment of royalties at a fixed
23 statutory rate. See 17 U.S.C. §§ 106, 115. See generally
24 Cherry River Music Co. v. Simitar Entm't, Inc., 38 F. Supp.
25 2d 310, 311-12 (S.D.N.Y. 1999) (describing licensing
26 scheme); 2-8 Nimmer on Copyright § 8.04 (same).

27 On appeal, 24/7 does not claim that a negotiated

1 license for use of the Ketchup Song was (expressly) granted
2 by Sony. Moreover, as the district court noted, 24/7 made
3 two unsuccessful attempts to negotiate a license with Sony
4 after distribution of the Ketchup Song was cancelled--on
5 November 14 and 26.

6 As to compulsory licensing under copyright law, 17
7 U.S.C. § 115(b)(1) provides:

8 Any person who wishes to obtain a compulsory
9 license under this section shall, before or within
10 thirty days after making, and before distributing
11 any phonorecords of the work, serve notice of
12 intention to do so on the copyright owner.
13

14 17 U.S.C. § 115(b)(1). That time-limit is strictly
15 enforced:

16 Failure to serve or file the notice required by
17 clause (1) forecloses the possibility of a
18 compulsory license and, in the absence of a
19 negotiated license, renders the making and
20 distribution of phonorecords actionable as acts of
21 infringement
22

23 Id. § 115(b)(2). It is undisputed that distribution of the
24 Ketchup Song started, at the latest, on November 5, 2002,
25 and that 24/7 mailed a notice of intent to obtain a
26 compulsory license to Sony on November 7, 2002--at least two
27 days after distribution began. (This notice was received by
28 Sony on November 8, 2002.) 24/7 therefore had no negotiated
29 license to use the Ketchup Song and had "foreclos[ed] the

possibility" of obtaining a compulsory license.

On appeal, 24/7 claims that it obtained an implied negotiated license from Sony, pointing to various actions and omissions by Sony in late 2002 and early 2003. We decline to consider the argument because it was not presented to the district court in the first instance. See Gwozdzinsky v. Magten Asset Mgmt. Corp., 106 F.3d 469, 472 (2d Cir. 1997) ("[A]bsent manifest injustice or a showing of extraordinary need, we will not decide an issue on appeal not first presented to the district court.").³

Finally, 24/7 argues that Artemis failed to provide 24/7 with notice and an opportunity to cure its failure to secure a license for the Ketchup Song, as required by section 14.03 of the Agreement. In rejecting this argument, the district court observed that 24/7 could not have procured a compulsory license, that its two attempts to obtain an express negotiated license were fruitless, and that "Artemis was not required to give 24/7 time to cure the license defect before ceasing distribution, because any such attempt to cure would have been futile." 24/7's affirmative

³ It is not contended on appeal that Artemis waived the requirement that 24/7 obtain a license prior to distribution of the Ketchup Song.

1 argument that the copyright holder--Sony--was implacably
2 opposed to 24/7's use of the song lends force to the
3 district court's reasoning. In any event, 24/7 does not
4 address that argument on appeal (except, perhaps, through
5 the argument that it obtained an implied license for the
6 Ketchup Song, an argument which itself is waived). State
7 Street Bank v. Inversiones Errazuriz, 374 F.3d 158, 172 (2d
8 Cir.2004) ("When a party fails adequately to present
9 arguments in an appellant's brief, we consider those
10 arguments abandoned."). 24/7 has therefore abandoned any
11 objection based on the notice-and-cure provision.⁴

12
13
14 _____b. Termination of the Agreement

15
16 _____Apart from the claimed breach concerning the Ketchup
17 Song dispute, 24/7 claims that Artemis breached the
18 Agreement by terminating it altogether. Artemis responds
19 that it "never terminated the Distribution Agreement and

⁴ Because 24/7's failure to secure a license for use of the Ketchup Song is dispositive, we need not consider [i] whether the district court properly concluded that the failure to secure a license would independently render any obligation to distribute unenforceable as part of "a bargain to commit an illegal act"; or [ii] the merit of Artemis's trademark-based objections to distribution of the Ketchup Song.

1 never ceased distributing [24/7's] records." The district
2 court made no mention of this contract dispute in its
3 opinion, and simply dismissed it after disposing of the
4 Ketchup Song claim. This was error.

5 First, the November 7, 2002 letter from Artemis's White
6 to 24/7's Pace concerning distribution of the Ketchup Song
7 went on to give notice that

8 effective immediately, [Artemis] requires the
9 office space it has previously made available to
10 you for use by your employee Donny Novakovic. I
11 understand from Ken Walsh, [Artemis's] CFO, that
12 you have informed Mr. Novakovic that he was to
13 vacate the premises by the end of business
14 November 6, 2002.

15
16 Finally, I am writing to confirm that since we
17 cannot agree on a renegotiated distribution rate;
18 and since on several occasions you have, for
19 whatever reason, refused to pay third party
20 vendors moneys owed, placing [Artemis] in an
21 uncomfortable and untenable position, [Artemis]
22 agrees that it would be best to terminate this
23 relationship immediately. I understand you have
24 been seeking a new distributor but we have not yet
25 been advised by you of your alternate distribution
26 agreements. Our first preference, as we have
27 previously advised you, is for you to obtain a new
28 distributor who will accept pending returns. Such
29 an arrangement would allow us to settle our
30 accounts promptly after we are notified of who
31 your new distributor is.

32
33 In the meantime, however, [Artemis] will shortly
34 be sending to retail outlets a notice advising
35 them that Artemis will not be distributing further
36 product or, after the period six months from the
37 date of such notice, accepting returns. During

1 this period [Artemis] will continue to account to
2 you monthly, paying any monies due you or,
3 concomitantly, expecting prompt payment of any
4 monies due [Artemis.] After this process has
5 concluded (unless in the meantime you secure
6 distribution) [Artemis] will render a final
7 accounting at which time [Artemis] will expect
8 final payment of any monies it may be due; or if
9 applicable, [Artemis] will pay you any final
10 monies due you.

11
12 (emphasis added). This letter came on the heels of various
13 Artemis e-mails indicating that Artemis was preparing to
14 terminate the Agreement. For instance, a November 6 e-mail
15 from Walsh to Jeff Brody, an associate at Artemis, stated:

16 I understand that Dean Tabaac may be the person
17 who sends out letters to the accounts to tell them
18 we are no longer distributing a label. Can you
19 get with him and let me know how much notice, if
20 any, we need to give retail before we send a
21 letter saying we are no longer distributing?
22 Obviously, 24/7 does not yet have a new
23 distributor and may not get one but we'll want to
24 send the letter out asap.

25
26 (emphasis added). A November 7, 2002 e-mail from Shannon
27 McSweeney, Director of Marketing Services at Artemis, warned
28 Artemis personnel, including Walsh, as follows:

29 Please be aware that effective immediately 24/7 is
30 no longer part of the Artemis account. From this
31 date forward we should not incur any 24/7 charges.
32 If you wish, you may establish a seperate [sic]
33 account with them, but Artemis will not be
34 involved with that account or decision.

1 The declaration of Lou Pace, 24/7's CEO, confirms that
2 "all business contact between [24/7, Artemis, and RED] came
3 to a complete halt" after November 7, 2002--the date of
4 White's letter--and that sales figures show that Artemis's
5 was no longer distributing its records, a point Pace
6 demonstrated by parsing Artemis' statement of account for
7 24/7's records in the period January 2002 to May 2003:

8 As can be seen, net billings for October 2002 were
9 \$12,559.49 and \$13,115.86 for November. In
10 December 2002, the first month following Artemis's
11 announced termination, net billings spiked
12 radically downward to a negative \$38,794.22. The
13 reason for this is that RED sold to the retailers
14 on a full return basis, and thus during the month
15 of December, returns from retailers back to
16 Artemis aggregated \$41,702.27 versus sales by
17 Artemis of \$2,908.05.

18
19 In addition, Pace confirmed that following the November 7
20 letter from White, Artemis evicted 24/7's head of promotion,
21 Danny Novakovic, from his office at Artemis and that:

22 [t]here was no discussion about marketing plans,
23 future releases, distribution of the 24/7 records
24 or any of the many other topics which [Pace and
25 Artemis representatives] regularly discussed on a
26 day to day basis prior to the termination of the
27 Distribution Agreement. Subsequent to November
28 8th, 24/7 was not allowed to submit any new
29 artists or product to Artemis for distribution.⁵

⁵ As noted in Part II of this Opinion, the record shows that on or about November 6, 2002, Artemis's executives were--at the very least--interested in

1 Artemis cites the deposition testimony of several
2 Artemis employees to support its contention that it never
3 terminated the Agreement and never stopped distributing
4 24/7's records.⁶ However, 24/7 produced evidence from which
5 a jury could find that the Agreement was terminated.
6 Anthony, 339 F.3d at 134 (on summary judgment, factual
7 inferences are drawn in non-moving party's favor, and motion
8 must be denied if there exists a genuine issue as to any
9 material fact). Otherwise, Artemis advances no reason,
10 based either on the terms of the Agreement or some principle
11 of New York contract law, why the termination of the
12 Agreement--if it occurred--was warranted.

13
14 c. Miscellaneous Claims

15 The complaint identified seven additional ways in which

terminating the Agreement. See infra.

⁶ We reject Artemis's (conclusory) argument that Pace's declaration is not cognizable because the assertions made therein are "conclusory" or "speculative." See Conroy v. N.Y. State Dep't of Corr. Servs., 333 F.3d 88, 94 (2d Cir. 2003) ("[M]ere conclusory allegations, speculation or conjecture will not avail a party resisting summary judgment." (citation omitted)). As 24/7's CEO, Pace could testify as to the business relationship between 24/7 and Artemis and the drop-off in sales following the alleged termination of the Agreement.

1 Artemis "materially breached the Distribution Agreement":

2
3 (a) failing to pay royalties due 24/7 pursuant to
4 the Distribution Agreement;

5
6 (b) deliberately inflating the amount of returns
7 by purchasers of 24/7 product and wrongfully
8 charging these returns against the 24/7 account;

9
10 (c) holding excessive reserves purportedly needed
11 to cover those returns;

12
13 (d) refusing to distribute and sell 24/7
14 recordings with the level of diligence, care and
15 skill and in breach of the covenant of good faith
16 and fair dealing implied by the terms of the
17 Distribution Agreement;

18
19 (e) purporting to incur expenses and charges for
20 which 24/7 was not responsible under the
21 Distribution Agreement and then holding 24/7
22 liable therefor;

23
24 (f) wrongfully retaining the irrevocable letter of
25 credit in the sum of \$100,000.00 issued by 24/7 in
26 favor of Artemis pursuant to the Distribution
27 Agreement;

28
29 (g) improperly purporting to charge 24/7 for
30 promotional expenses which were no[t] actually
31 incurred or for which 24/7 was not liable under
32 the terms of the Distribution Agreement

33 As with the termination claim, the district court
34 summarily dismissed these miscellaneous claims after dealing
35 with the Ketchup Song. On appeal, Artemis claims that, in
36 any event, 24/7 failed to produce any evidence to support
37 these claims. We agree with Artemis that 24/7 produced

1 insufficient evidence as to these claims, but we reverse
2 nevertheless.

3 In its Rule 56.1 Statement of Undisputed Facts, Artemis
4 as movant adduced no facts relating to the miscellaneous
5 claims. However, Rule 56.1 of the Local Civil Rules of the
6 United States District Court for the Southern and Eastern
7 Districts of New York concerns only the "material facts as
8 to which the moving party contends there is no genuine issue
9 to be tried." "A court is not required to consider what
10 the parties fail to point out in their Local Rule 56.1
11 statements," Holtz v. Rockefeller & Co., Inc., 258 F.3d 62,
12 73 (2d Cir. 2001), although "it may in its discretion" do
13 so. Id. Since the district court did not mention the
14 miscellaneous claims, we have no way of knowing whether it
15 would have looked past Artemis's failure to put issues of
16 fact relating to these claims into play and whether Artemis
17 otherwise satisfied its moving burden to show--"that is,
18 point[] out to the district court--that there [was] an
19 absence of evidence to support" these claims. Celotex Corp.
20 v. Catrett, 477 U.S. 317, 323-25 (1986). But if (as it
21 seems) Artemis failed to discharge this burden, "summary
22 judgment must be denied, 'even if no opposing evidentiary

1 matter is presented,' for the non-movant is not required to
2 rebut an insufficient showing." Giannullo v. City of New
3 York, 322 F.3d 139, 140-41 (2d Cir. 2003) (quoting Adickes
4 v. S.H. Kress & Co., 398 U.S. 144, 157 (1970) (quotation
5 omitted)).

6 We therefore reverse the grant of summary judgment as
7 to the miscellaneous claims, without prejudice to further
8 motion practice.

9
10 d. Waiver

11 _____Appellees' chief argument as to the termination and
12 miscellaneous claims is that, even if 24/7 could prevail on
13 the merits, 24/7 waived its claims by failing to present
14 them to the district court in the first instance. See
15 Gwozdzinsky v. Magten Asset Mgmt. Corp., 106 F.3d 469, 472
16 (2d Cir. 1997) ("[A]bsent manifest injustice or a showing of
17 extraordinary need, we will not decide an issue on appeal
18 not first presented to the district court."). Specifically,
19 Appellees contend that in the district court, 24/7 did not
20 present these claims as distinct claims that would survive
21 regardless of the court's resolution of the Ketchup Song
22 claim. Whether or not Appellees' characterization is apt,

1 we observe that even though the district court clearly
2 overlooked the termination and miscellaneous claims in
3 making its decision, 24/7 did not move the district court to
4 reconsider that decision.

5 Although it may be that 24/7's failure to move for
6 reconsideration was designed to achieve, in effect, what
7 otherwise would have been an unjustified interlocutory
8 appeal of the dismissal of the Ketchup Song claim, we
9 address the termination and miscellaneous claims on appeal.
10 See Singleton v. Wulff, 428 U.S. 106, 121 (1976) ("The
11 matter of what questions may be taken up and resolved for
12 the first time on appeal is one left primarily to the
13 discretion of the courts of appeals, to be exercised on the
14 facts of individual cases."); Booking v. Gen. Star Mgmt.
15 Co., 254 F.3d 414, 418 (2d Cir. 2001) ("[W]e have broad
16 discretion to consider issues not raised in the District
17 Court."). Among other reasons, in this case the district
18 court did not reach certain of 24/7's claims at all, and the
19 record presents a clear basis upon which to reverse the
20 grant of summary judgment as to those claims. See, e.g.,
21 Singleton, 428 U.S. at 121 ("Certainly there are
22 circumstances in which a federal appellate court is

1 justified in resolving an issue not passed on below, as
2 where the proper resolution is beyond any doubt."); Booking,
3 254 F.3d at 419 (exercising discretion to address issue
4 where, inter alia, "substantial injustice" would otherwise
5 result; that is, plaintiff's recovery turned on issue that
6 district court declined to address).

7 8 **II. Tortious Interference and Unfair Competition**

9 24/7 claims that Sony induced Artemis to cease
10 distribution of 24/7's Ketchup Song and to terminate the
11 Agreement, thus tortiously interfering with the Agreement
12 and violating New York's unfair competition laws. The
13 district court dismissed these claims based on its dismissal
14 of 24/7's breach-of-contract claims. The court reasoned
15 (and 24/7 does not dispute) that absent proof of an
16 underlying breach of contract, a plaintiff cannot prove
17 tortious interference, see Israel v. Wood Dolson Co., 1
18 N.Y.2d 116, 120 (1956); Gianelli v. St. Vincent's Hospital &
19 Med. Ctr., 553 N.Y.S.2d 677, 681 (App. Div. 1990), or unfair
20 competition, Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis
21 Council, 857 F.2d 55, 75 (2d Cir. 1988). However, while the
22 district court properly dismissed the claim that Artemis

1 breached the Agreement by failing to distribute the Ketchup
2 Song, it erred--as previously discussed--in dismissing
3 24/7's claim that Artemis wrongfully terminated the
4 Agreement. See supra. Therefore, the question is whether
5 24/7 has produced sufficient evidence that Sony induced that
6 breach. See Israel, 1 N.Y.2d at 120 (tortious interference
7 claim requires proof that the defendant intentionally
8 procured the breach of contract); Gianelli, 553 N.Y.S.2d at
9 681 (same); Volvo, 857 F.2d at 75 (unfair competition claim
10 requires proof that conduct of the defendant proximately
11 caused the misappropriation of property of or benefit to the
12 plaintiff). Reviewing the evidence in the light most
13 favorable to 24/7, the answer is yes.

14 24/7 claims that even though Artemis and Sony have no
15 formal business relationship, Sony dominates Artemis
16 economically. There is evidence tending to support this
17 assertion. Artemis's CEO, Danny Goldberg, testified at his
18 deposition that in 2002--when Artemis allegedly terminated
19 the Agreement--Sony was considering investing in Artemis
20 (although by 2003 it became clear that was not going to
21 happen). So, although Goldberg would never "want to do
22 anything that violated [Artemis's] legal obligation," he

1 would rather "not have an unhappy Sony." Moreover, the firm
2 that handled at least some distribution for Artemis under
3 the terms of the Agreement (RED) is a wholly-owned
4 subsidiary of Sony.

5 An available inference is that Goldberg was open to
6 suggestions when, on November 6, 2002, "several Sony
7 executives" called Goldberg to express their displeasure
8 over the release of 24/7's Ketchup Song. For instance,
9 Goldberg recalled a profanity-laced conversation with Don
10 Ienner, the then-President of Sony-affiliate Columbia
11 Records, who said he was "unhappy," "aggravated," and
12 "grumpy" about the release of 24/7's Ketchup Song single,
13 and that he did not "like the idea that there was another
14 Ketchup Song coming out. He was hoping that [Artemis] could
15 withdraw it." Goldberg undertook to "see if there is a
16 basis on which [Artemis] can withdraw it." Ienner had a
17 similar conversation with Ken Antonelli of RED.

18 After these conversations, Goldberg informed Artemis
19 CFO Ken Walsh that there "was an issue" with the Ketchup
20 Song, and instructed Walsh to speak with Adrian White,
21 Artemis's Executive Vice President of Business and Legal
22 Affairs. According to Walsh, Goldberg said he could not

1 "believe we are still in this relationship. I want to get
2 out of this relationship." Walsh communicated Goldberg's
3 view to White, noting that "Danny wants to sever this
4 relationship, doesn't understand why we are still involved,
5 and he wants you to look at the agreement." According to
6 White, Walsh stated that "Sony was upset about 'The Ketchup
7 Song' and Danny [Goldberg] wanted to get out of the 24/7
8 relationship."

9 For his part, Pace of 24/7 avers that Walsh contacted
10 him on November 6 and told him:

11 not only was the Ketchup Song being pulled but my
12 entire distribution deal with RED was being
13 cancelled. When I asked [Walsh] why this was
14 happening he stated that the Ketchup Song had
15 created a major issue with Artemis and the powers
16 that be.

17 As previously noted, during the next two days, internal
18 Artemis e-mails and White's letter to Pace showed--at least
19 arguably--that Artemis was terminating its dealings with
20 24/7.

21 A reasonable inference from the evidence presented is
22 that Sony intentionally caused Artemis not only to cancel
23 distribution of the Ketchup Song, but also to terminate the
24 Agreement in its entirety. While Sony points to evidence
25 that supports alternative views--that the Agreement was

1 never terminated, that the termination of the Agreement was
2 contemplated by Artemis long before Sony came into the
3 picture, etc.--deciding between these competing views is for
4 the jury. The evidence is sufficient to permit 24/7's
5 tortious interference and unfair competition claims to
6 proceed.

8 **CONCLUSION**

9 We have considered the parties' remaining arguments and
10 find each of them to be without merit. For the foregoing
11 reasons, the judgment of the district court is affirmed in
12 part and reversed in part, and this case is remanded for
13 proceedings consistent with this opinion.